



GENERAL SERVICES ADMINISTRATION

48 CFR Part 6106

[CBCA Case 2019-61-01; Docket No. GSA-GSABCA-2019-0005;

Sequence No. 1]

RIN 3090-AK07

**Civilian Board of Contract Appeals; Rules of Procedure of the
Civilian Board of Contract Appeals**

AGENCY: Civilian Board of Contract Appeals; General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The Civilian Board of Contract Appeals (Board) amends its rules of procedure to include arbitration of disputes between applicants for public assistance grants and the Federal Emergency Management Agency (FEMA) regarding disasters after January 1, 2016. The Board is promulgating a final regulation after considering the one set of comments received on the proposed rules.

DATE: Effective [**Insert date 30 days after date of publication in the FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Mr. James Johnson, Co-Chief Counsel, Civilian Board of Contract Appeals, 1800 M Street NW, Suite 600, Washington, DC 20036; at 202-606-8788; or email at jamesa.johnson@cbca.gov, for clarification of content. For information on status or publication schedules, contact the Regulatory Secretariat

Division at 202-501-4755. Please cite CBCA Case 2019-61-01.

SUPPLEMENTAL INFORMATION:

A. Background

The Board was established within GSA by section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163. Board members are administrative judges appointed by the Administrator of General Services under 41 U.S.C. 7105(b)(2). The FAA Reauthorization Act of 2018, Pub. L. 115-254, amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5189a(d), to authorize the Board to arbitrate certain disputes between FEMA and applicants for public assistance disaster grants.

The Board published in the **Federal Register** at 84 FR 7861, March 5, 2019, proposed rules of procedure for such arbitration. The notice invited comments on the proposed rules and announced the Board's intention to promulgate final rules after reviewing and considering comments.

The comment period closed on May 6, 2019. The Board received one set of comments. The Board has considered those comments and revised the proposed rules as explained in part B below. The Board now promulgates final rules of procedure. These rules facilitate the efficient assembly of a record that will allow each arbitration panel to issue a

just and reasoned decision resolving the dispute before it at the speedy pace that parties expect in arbitration.

B. Comments and Changes

FEMA was the only commenter. FEMA suggested specific changes to five proposed rules (Rules 603, 604, 606, 608, and 612). The Board addresses the comments as follows.

Comment: In proposed Rule 603, FEMA suggested replacing the words "final agency action" with "final agency determination" and adding the words "on an applicant's eligibility for public assistance" to the end of the rule after the word "decision."

Response: The Board does not adopt these suggestions. "Agency action" is a term of art for an administrative decision that is reviewable in court under the Administrative Procedure Act, 5 U.S.C. 702. The statement in Rule 603 that covered disputes "come to the Board prior to final agency action" is correct regardless of the terminology that FEMA may use for such actions. Adding words to the end of the rule also would not enhance clarity, as the first sentence already specifies "public assistance eligibility and repayment disputes" as the subject matter of arbitration.

Comment: In proposed Rule 604, FEMA suggested incorporating "nearly all of the content of 44 C.F.R.

206.209(e)-(m)," FEMA's regulation for arbitration of public assistance disputes involving Hurricanes Katrina and Rita, excluding paragraphs (e)(2) and (h)(3) of the FEMA regulation. FEMA identified no substantive conflicts (as distinct from wording differences) between proposed Rule 604 and FEMA's Katrina/Rita arbitration regulation. FEMA noted that the proposed rules omit "a time to file an arbitration request."

Response: The proposed rules are already substantially consistent with FEMA's regulation, which states, "The arbitration will be conducted pursuant to procedure established by the arbitration panel." 44 CFR 206.209(c). As the designated arbitrator under 42 U.S.C. 5189a(d) of certain disputes regarding disasters after January 1, 2016, the Board is now adopting uniform panel procedures.

The omission of a time to file an arbitration request is intentional. The amended Stafford Act states that to request arbitration, an applicant for relief "shall submit the dispute to the arbitration process established" by FEMA for Katrina and Rita disputes. 42 U.S.C. 5189a(d)(5). The Board interprets the statutory term "process" to mean the steps established by FEMA for submitting a dispute to arbitration, including the timing and content of an arbitration request. The proposed rule thus defers to

FEMA's current and future published guidance on those processing matters. After submittal, consistent with "the arbitration process" to which the Act refers, "[t]he arbitration will be conducted pursuant to procedure established by the arbitration panel." 44 CFR 206.209(c). The Act does not direct the Board to use arbitration *procedures* directly from FEMA's Katrina/Rita regulation.

The Board has carefully and independently considered the content of 44 CFR 206.209 in response to FEMA's comment. The Board agrees that its procedural rules should address the timing of a response by FEMA to an arbitration request, and ex parte contacts. The Board adds sentences to Rules 608 and 609 that track the substance of 44 CFR 206.209(e)(4) and (j). The Board also adds language to Rule 606 to clarify that the parties do not pay the Board for arbitration services.

Comment: To proposed Rule 606, FEMA proposed adding, "For each request, a decision under Rule 613 will be issued by the panel."

Response: The Board agrees that this sentence clarifies its intent, and includes it, slightly altered, in Rule 606.

Comment: In proposed Rule 608, FEMA objected to the statement that a panel will receive a response to new

evidence "to the extent practicable." FEMA argued that it should "always" be entitled to file a response.

Response: The language at issue is important because the Stafford Act directs arbitrators to "consider from the applicant" (not from FEMA) supporting evidence submitted "at any time during arbitration." 42 U.S.C. 5189a(d)(2). Panels cannot necessarily obtain responses to all new evidence, up to and including the last day of arbitration. That is why the last sentence of Rule 608 warns that a panel may discount the "significance, weight, or probative value" of delayed or surprise evidence. As noted above, the final rule sets a time for FEMA's response to an arbitration request. The Board retains the limiting phrase "to the extent practicable" in Rule 608 for responses to later-offered evidence. Panels will decide practicability case by case.

Comment: In Rule 612, FEMA suggested deleting the first sentence, regarding statutory intent.

Response: The Board agrees and removes this sentence from Rule 612, adding the words "of streamlining" to the second sentence for clarity.

The final regulation includes changes discussed above as well as minor, non-substantive corrections of the proposed rules. The corrections are as follows.

In Rule 604, a citation to 44 CFR 206.209(e) is deleted from the first sentence, and the second sentence is deleted, as unnecessary. In Rule 605, the second "by" is deleted from the third sentence as unnecessary. In the sixth sentence of Rule 608, "before the close of arbitration" is shortened to "before arbitration closes." In the fourth sentence of Rule 610, a comma is deleted and the word "involuntary" is inserted before "prehearing" for clarity. In the seventh and eighth sentences of Rule 611, the word "to" is inserted in "or [to] make," and "made" is inserted before "subject to."

C. Regulatory Flexibility Act

GSA certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 602 et seq., and the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, because the final rule does not impose any additional costs on small or large businesses.

D. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply because this final rule does not impose any information collection requirements that require the approval of the Office of Management and Budget.

E. Congressional Review Act

The final rule is exempt from Congressional review under Pub. L. 104-121 because it relates solely to agency organization, procedure, and practice and does not substantially affect the rights or obligations of non-agency parties.

F. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, or E.O. 13563, Improving Regulation and Regulatory Review, dated January 18, 2011. This final rule is not a major rule under 5 U.S.C. 804.

G. Executive Order 13771

This final rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

List of Subjects in 48 CFR Part 6106

Administrative practice and procedure; Disaster relief.

Dated: June 14, 2019.

Jeri Kaylene Somers,
Chair, Civilian Board of Contract Appeals,
General Services Administration.

Therefore, GSA adds 48 CFR part 6106 to read as follows:

PART 6106—RULES OF PROCEDURE FOR ARBITRATION OF PUBLIC ASSISTANCE ELIGIBILITY OR REPAYMENT

Sec.

- 6106.601 Scope [Rule 601].
- 6106.602 Authority [Rule 602].
- 6106.603 Purpose [Rule 603].
- 6106.604 Arbitration request [Rule 604].
- 6106.605 Parties; representation; email service [Rule 605].
- 6106.606 Arbitrators; panels; costs [Rule 606].
- 6106.607 Initial conference [Rule 607].
- 6106.608 Evidence; timing [Rule 608].
- 6106.609 Other materials considered; ex parte communications [Rule 609].
- 6106.610 Motions [Rule 610].
- 6106.611 Hearing; live or paper [Rule 611].
- 6106.612 Streamlined procedures [Rule 612].
- 6106.613 Decision; finality [Rule 613].

Authority: 42 U.S.C. 5189a(d).

6106.601 Scope [Rule 601].

The rules in this part establish procedures for arbitration by the Board at the request of an applicant for public assistance from the Federal Emergency Management Agency (FEMA) for a disaster that occurred after January 1, 2016.

6106.602 Authority [Rule 602].

The Board is authorized by section 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5189a(d), to arbitrate disputes between applicants and FEMA as to eligibility for public

assistance (or repayment of past public assistance) for a disaster post-dating January 1, 2016, when the disputed amount exceeds \$500,000 or, for an applicant in a rural area, is at least \$100,000.

6106.603 Purpose [Rule 603].

Under the Stafford Act, the Board acts for the United States Government to resolve public assistance eligibility and repayment disputes by arbitration, a speedy and flexible method of impartial dispute resolution. Eligibility and repayment disputes come to the Board prior to final agency action by FEMA. An arbitration decision under these rules is the final action by the Executive Branch in a dispute. These rules facilitate the creation of an arbitration record sufficient to allow the Board to issue a prompt, just, and reasoned decision.

6106.604 Arbitration request [Rule 604].

(a) An applicant for public assistance may request arbitration by following applicable FEMA guidance implementing section 423 of the Stafford Act.

(b) Applicants shall efile arbitration requests with the Board as prescribed by Board Rule 1 (48 CFR 6101.1). Voluminous attachments may be filed separately in electronic media as if under Board Rule 4(b)(1) and (3) (48 CFR 6101.4(b)(1) and (3)). The Clerk of the Board will

acknowledge an arbitration request by emailing the parties a docketing notice.

6106.605 Parties; representation; email service [Rule 605] .

The parties to an arbitration are the applicant, the grantee (if not the applicant), and FEMA. Each party shall have one primary representative. This person need not be an attorney but must be authorized by law, formal delegation, or permission of the arbitrators to speak and act for the party in the arbitration. Unless otherwise advised, the Board deems the person who signed the arbitration request to be the applicant's primary representative. Any other primary representative or other party representative shall promptly efile a notice of appearance complying with Board Rule 5(b) (48 CFR 6101.5(b)). Unless otherwise directed by the panel, a party shall email its efilings to every other party's primary representative at the time of filing.

6106.606 Arbitrators; panels; costs [Rule 606] .

The Board assigns three judges as the panel of arbitrators for each request. A single arbitrator may act on behalf of a panel under Rules 607 and 611. A full panel issues any decision under Rule 613. The Board arbitrates at no cost to the parties, who bear their own costs of participation.

6106.607 Initial conference [Rule 607].

The panel will hold a telephonic scheduling conference with all parties as soon as practicable, ordinarily within 14 calendar days after the Clerk docketed an arbitration request. Each primary party representative shall participate in the conference. At least one panel member will preside. The panel will promptly issue to the parties a written summary of the conference and the schedule. A party has 5 calendar days from receipt of the panel's conference summary to efile any objection to it. The panel may hold and summarize other conferences as necessary.

6106.608 Evidence; timing [Rule 608].

No party is required to provide additional evidence. An applicant or grantee may, but need not, supplement materials it previously provided to FEMA regarding the dispute. A party may elect to present additional evidence, i.e., documents, things, or testimony tending to make a factual contention appear more or less likely to be true. If a party so elects, the panel will to the extent practicable allow a response. FEMA shall efile its response to an arbitration request within 30 calendar days after receiving the docketing notice. A panel may not exclude as untimely evidence proffered before arbitration closes under Rule 613. A panel may consider the timing or surprise

nature of evidence when assessing the significance, credibility, or probative value of the evidence.

6106.609 Other materials considered; ex parte communications [Rule 609].

Written or oral arguments or statements of experts as to how a panel should understand evidence or apply the law are not evidence but may be presented as scheduled by the panel and may be subject to page, word, or time limits. By the close of arbitration under Rule 613, parties should provide the panel with everything it needs to make a decision. Documents written by a party for the panel during arbitration shall comply with Board Rules 1(b) ("Efiles; efilings"), 7, and 23 (48 CFR 6101.1(b), 6101.7, and 6101.23). No member of a panel or of the Board's staff will communicate with a party about any material issue in arbitration outside of the presence of the other party or parties, and no one shall attempt such communications on behalf of a party.

6106.610 Motions [Rule 610].

Motions are strictly limited and should ordinarily be made orally during the initial conference under Rule 607. A later motion may be efiled. A party may make a procedural motion, such as to extend time. An applicant may move for voluntary dismissal. No party may move for a prehearing

merits decision (e.g., summary judgment or dismissal for failure to state a claim) or for involuntary prehearing dismissal other than on the merits except on the grounds that an arbitration request is untimely. A panel ordinarily issues one decision per arbitration.

6106.611 Hearing; live or paper [Rule 611] .

Parties may conclude arbitration by presenting their positions in a hearing. A hearing may be live or, if agreed by all parties, on a written record (a "paper hearing") or a combination of the two. The panel will begin a hearing within 60 calendar days after the initial conference under Rule 607 unless the Board Chair approves a later date. All panel members will attend a live hearing in Washington, D.C. A single panel member may conduct a live hearing elsewhere. Hearing procedures are at the panel's discretion, with the goal of promptly, justly, and finally resolving the dispute, and need not involve traditional witness examination or cross-examination. Parties should not offer fact witnesses to read legal materials or to make legal arguments. Statements of fact in a hearing need not be sworn but are made subject to penalty for violation of 18 U.S.C. 1001. Live hearings are not public and may not be recorded by any means without the Board's permission. The Board may have a live hearing transcribed for the panel's

use. If a transcript is made, a party may purchase a copy and has 7 calendar days after a copy is available to efile proposed corrections.

6106.612 Streamlined procedures [Rule 612].

The Board encourages parties to focus on providing only the information a panel needs to resolve an eligibility or repayment dispute. Examples of streamlining may include without limitation—

(a) Electing not to supplement the materials already provided to FEMA, if (or to the extent) the existing record adequately frames the dispute;

(b) Relying when possible on documents over other types of evidence;

(c) Simplifying live hearings by efilings in advance written testimony, reports, or opening statements by some witnesses or party representatives;

(d) Refraining from objecting to evidence without good cause; and

(e) Omitting duplicative and immaterial evidence and arguments.

6106.613 Decision; finality [Rule 613].

The panel will advise the parties when the arbitration is closed. The panel will resolve a dispute within 60 calendar days thereafter unless the panel advises the

parties that the Board Chair approves a later date. The panel's decision may be issued in writing or orally with transcription. A decision is primarily for the parties, is not precedential, and should concisely resolve the dispute. The decision of a panel majority is the final administrative action on the arbitrated dispute and is judicially reviewable only to the limited extent provided by the Federal Arbitration Act (9 U.S.C. 10). Within 30 calendar days after issuing a decision, a panel may correct clerical, typographical, technical, or arithmetic errors. A panel may not reconsider the merits of its decision resolving an eligibility or repayment dispute.

Billing Code 6820-AL

[FR Doc. 2019-13081 Filed: 6/20/2019 8:45 am; Publication Date: 6/21/2019]